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CITATIONS

759512—47——1

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 325

THE UNITED STATES, PETITIONER

v.

A. M. LANDMAN, SUPERINTENDENT OF THE FIVE CIVILIZED TRIBES, FOR ESTATE OF PUNSKEE FIELD, DECEASED CREEK, ROLL NO. 4564

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled cause on June 6, 1947.

OPINION BELOW

The opinion of the Court of Claims (R. 11–17) is reported at 71 F. Supp. 640.

JURISDICTION

The judgment of the Court of Claims was entered on June 6, 1947 (R. 18). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether the value of the 160 acres of restricted allotted land, including the oil and gas royalty interest therein, of a restricted Creek Indian, designated pursuant to Section 4 of the Act of May 10, 1928, to remain exempt from taxation, and owned by him at the time of his death, should be included in his gross estate for federal estate tax purposes.

STATUTES INVOLVED

The statutes involved are set out in the Appendix, *infra*, pp. 12–18.

STATEMENT

The special findings of fact of the Court of Claims (R. 4–11) may be summarized as follows:

Respondent, representing the Secretary of the Interior, who is by law custodian of the property of restricted Indians, duly filed a federal estate tax return for the Estate of Punskee Field, a full-blood, restricted Creek Indian, who died intestate on June 5, 1940. Decedent's entire estate passed in equal shares to his wife and two daughters, all full-blood, restricted Creek Indians. (R. 5, 9–10.)

Decedent's gross estate included $1,424, representing the value of his 160 acres of designated allotted land, plus $4,500, representing the value of his oil and gas royalty interest therein; $2,500 representing the value of a purchased house and

lot; $104,937.50 representing the value of United States Treasury bonds purchased for him by the Secretary of the Interior from restricted funds, plus accrued interest thereon of $638.89; cash of $7,172.46, plus interest thereon of $25.49; and miscellaneous personal property items of an aggregate value of $565. (R. 5.)

The estate tax shown due on the return filed by the respondent was duly paid and respondent thereafter filed a claim for refund of the entire amount. The general ground of the claim was that since all of decedent's property was restricted and held in trust for him under supervision of the United States and continued to be so held for the benefit of his heirs, the property was immune from federal taxation and therefore should not be included in his taxable estate. Except for a minor adjustment, not here material, the claim was formally rejected by the Commissioner of Internal Revenue on June 4, 1945. (R. 5–7.)

The 160 acres of land in decedent's estate were allotted to him under the provisions of the Original Creek Agreement between the United States and the Creek Tribe, ratified by Congress on March 1, 1901 (c. 676, 31 Stat. 861), as amended by the Supplemental Creek Agreement ratified by Congress on June 30, 1902 (c. 1323, 32 Stat. 500; Appendix, *infra*, pp. 12–14). Decedent

received one deed for 40 acres as a homestead and a separate deed for 120 acres.[1] (R. 7–9.)

[1] Decedent's allotment represented his share of the Tribal lands transferred to him individually by deeds dated August 28, 1903. The Creek agreements contemplated the extinguishment of the separate National or Tribal Government of the Indians. Under the terms of the Supplemental Creek Agreement, decedent's homestead was to "be and remain non-taxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefore." Section 19 of the Act of April 26, 1906 (c. 1876, 34 Stat. 137, 144; Appendix, *infra*, pp. 14–15) extended restrictions against incumbrance or alienation of all allotted lands for a period of 25 years from the passage of the Act unless earlier removed by Congress. It provided for continued tax exemption of restricted lands so long as title remained in the original allottee. The Act of May 27, 1908 (c. 199, 35 Stat. 312; Appendix, *infra*, pp. 16–17) amended Section 19 of the Act of April 26, 1906, by authorizing the Secretary of the Interior to remove restrictions against alienation or incumbrance of allotted lands in individual cases, with the provision that unrestricted land should be thereafter subject to taxation and all other civil burdens. The Act contained no mention of tax exemptions of Indian lands. By Act of May 10, 1928 (c. 517, 45 Stat. 495; Appendix, *infra*, pp. 17–18) Congress continued the restrictions on allotted lands to April 26, 1956, unless earlier removed under the appropriate statutory provisions. The Act, however, required each legally competent Indian to "designate" the particular 160 acres of his land which was "to remain exempt from taxation," while held by the Indian or any full-blood restricted Indian heir or devisee, until April 26, 1956. Section 3 of the Act (Appendix, *infra*, pp. 17–18) specifically subjected to all minerals produced from allotted lands after April 26, 1931, to state and federal taxes of every character. Section 4 (Appendix, *infra*, p. 18) authorized the State of Oklahoma to levy taxes on all allotted lands in excess of the designated 160 acres of each Indian.

Pursuant to Section 4 of the Act of May 10, 1928 (c. 517, 45 Stat. 495; Appendix, *infra,* p. 18) Punskee Field's originally allotted 160 acres were designated as his tax-exempt lands in June 1929. At the time of decedent's death those 160 acres of allotted lands were fully restricted and could not be sold, leased or otherwise incumbered without approval of the Secretary of the Interior, under the Act of Congress of April 26, 1906, ratified and approved by the Creek Tribe on October 2 and 3, 1907, and by the President of the United States on September 17, 1907, the Act of May 27, 1908, and the Act of May 10, 1928. (R. 7–8; see Appendix, *infra,* pp. 14–18).

On January 24, 1919, an oil and gas mining lease was executed covering Punskee Field's entire 160 acre allotment. Production was obtained in 1922. From that time until April 26, 1931, royalties, aggregating $566,339.11, were paid into Field's account with the Secretary of the Interior. During that period, also, interest in the amount of $83,010.56 was credited to Field's account on the balances appearing therein. Royalties accruing between April 26, 1931, and the date of Field's death, plus interest thereon, and certain minor items of income, brought Field's aggregate income paid to the Secretary of the Interior through the years, to $720,035.79. Of that amount there was disbursed to Field, or for his benefit, $388,896.19 prior to April 26, 1931, and $323,-

717.04 between that date and June 5, 1940. Of the United States Treasury bonds in decedent's estate on June 5, 1940, those of a value of $99,784.46 had been purchased for him on October 13, 1935. (R. 9.) The house and lot, valued in decedent's gross estate at $8,500, was purchased for him out of his restricted funds on January 9, 1924. (R. 7.)

Upon these special findings, the Court of Claims concluded that the cash and the bonds and real estate into which portions of the royalties had been converted were properly included in decedent's gross estate (R. 16–17), but that the 160 acres of designated allotted land, including the oil and gas royalty interest therein, should have been excluded (R. 14–16).

SPECIFICATION OF ERROR TO BE URGED

The Court of Claims erred:

In holding that the value of decedent's designated allotted land, including the oil and gas royalty interest therein, should have been excluded from his gross estate for federal estate tax purposes.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Claims that the value of decedent's 160 acres of designated allotted land and the value of the oil and gas royalty interest therein should have been excluded from his gross estate for federal estate tax pur-

poses is in direct conflict with the result of the decision of the Circuit Court of Appeals for the Tenth Circuit in *Landman* (*Estate of Jeanetta Burgess*) v. *Commissioner,* 123 F. 2d 787, certiorari denied, 315 U. S. 810. In that case the issues before the court were identical with those presented to the court below here, and on the question of the inclusion in the taxable estates of restricted Indians for federal estate tax purposes of the designated allotted lands and the oil and gas royalty interest therein, the decisions are irreconcilable.

In the *Burgess Estate* case, the court held that the value of the 160 acres of designated allotted land was properly included in the taxable estate of a deceased Creek Indian. The decision was premised on the concept that an estate tax is not a burden on the property comprising the estate but is an excise tax "upon the shifting of the economic burdens and benefits, or on the privilege of transferring property of decedent at death" (123 F. 2d at 790).

Subsequent to denial of certiorari in the *Burgess* case, this Court granted certiorari in *Oklahoma Tax Commission* v. *United States,* 319 U. S. 598; that case involved the right of the State of Oklahoma to levy estate taxes on the transfers of estates of three members of the Five Civilized Tribes of Indians. This Court decided that the State of Oklahoma was authorized to subject to its estate taxes the entire property of which a

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restricted Indian died possessed, except for the value of his 160 acres of designated allotted land. Four Justices of this Court dissented in that case on the ground that restriction of the Indian's property was tantamount to immunity from *State* taxation, a principle recognized as not extending to taxation by the Federal Government (319 U. S. 614–616, 621).

The brief on behalf of the United States in the *Oklahoma Tax Commission* case did not take issue with the decision of the Tenth Circuit in the *Burgess Estate* case, but expressed agreement as to the result there reached, though not as to some of the reasoning of the opinion (U. S. Br. 93–94, Nos. 623–625, Oct. T. 1942). The *Burgess Estate* case was cited by both the majority and the minority of this Court in the *Oklahoma Tax Commission* case, the majority referring to it (319 U. S. at 608) as a well-reasoned decision, and the minority explaining it (319 U. S. at 621) as having no bearing upon a consideration of the effect of restriction upon the power of a State to tax, for the historical reason that restrictions designed to protect the Indians from themselves and the actions of third parties, including State governments, did not bar taxation by the Federal Government.

In the instant case and in the prior case of *Landman* (*Estate of Jacob Pierce*) v. *United States*, 103 C. Cls. 199, the Court of Claims regarded the decision of this Court in the *Oklahoma Tax Commission* case as controlling. That court

drew no distinction between the power of the State of Oklahoma and that of the Federal Government to levy taxes on restricted Indians, and concluded that since the estate taxes of the State of Oklahoma and of the United States were identical in character, the same principle should be applicable to both.

While we believe that the Court of Claims was correct in concluding, both here and in the *Pierce* case, that any property subject to the State's estate tax is likewise subject to the Federal estate tax, it does not follow that the converse of that proposition is true, i. e., that property which is not subject to the State's estate tax is not subject to the Federal estate tax. In the *Oklahoma Tax Commission* case, a majority of this Court held that the transfer of those lands which Congress had exempted from direct taxation by the State was also exempted from State estate taxes (319 U. S. at 610–611). But it seems clear that both the majority and minority opinions were limited to the question of State taxes, and certainly nothing in either opinion reflects any disagreement with the result reached in the *Burgess Estate* case.

It may be doubted whether any of the specific exemptions from taxation contained in various Acts here pertinent were intended to prevent the application to Indians and their property of federal tax provisions which operate uniformly throughout the nation. It had early been held that Congress had power to lay taxes upon prop-

erty within Indian Territory (*The Cherokee Tobacco,* 11 Wall. 616). The specific tax exemption written into the earlier allotment acts were, we submit, designed solely to limit the taxing power of Territories and territorial townships, which were creatures of Congress. Moreover, under the Act of March 1, 1901 (Appendix, *infra,* pp. 12–14), and the supplemental agreement in the Act of June 30, 1902 (Appendix, *infra,* p. 14), the specific exemption from taxation was confined to the allotment of forty acres of land selected as a homestead and was limited to a period of twenty-one years. The allotment to the decedent in this case was in 1903, and he died in 1940.

There is nothing in the language or history of the Act of April 26, 1906, showing a purpose on the part of Congress that the exemption from taxation contained in Section 19 thereof (Appendix, *infra,* pp. 14–15), should apply to federal taxes; and, in any event, as this Court held in *Superintendent* v. *Commissioner,* 295 U. S. 418, 420–421), that section was superseded by Section 4 of the Act of May 27, 1908 (Appendix, *infra,* p. 16). Section 4, in terms at least, dealt only with the effect upon taxability of the removal of restrictions upon land.

It would seem clear that the Act of May 10, 1928, curtailed rather than extended the tax exemptions of Indian lands. This Court in the *Oklahoma Tax Commission* case gave the 1928 Act that effect. The only specific exemption contained in the Act of May 10, 1928, is set forth in

Section 4 (Appendix, *infra*, p. 18). The structure of that section warrants the conclusion that it deals only with taxation by the State of Oklahoma, a result which is consistent with its legislative history. See S. Rep. No. 982, 70th Cong., 1st Sess., pp. 4–5.

The question presented here is an important and continuing one in the administration of the internal revenue laws. Many similar estates of restricted Indians have claims for refunds pending in the Bureau of Internal Revenue involving the same issue. The Treasury Department, represented by the Commissioner of Internal Revenue, and the Department of the Interior, here represented by the Superintendent of the Five Civilized Tribes, have long disagreed as to the correct result. Administrative disposition of Indian estate matters will be promoted by an authoritative determination by this Court of the tax question involved.

CONCLUSION

The decision below on the point here presented is in direct conflict with the result of the *Burgess Estate* case decided by the Tenth Circuit. The question is of general and continuing importance. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

SEPTEMBER 1947.

APPENDIX

Internal Revenue Code:

SEC. 810. RATE OF TAX.

A tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 812) shall be imposed upon the transfer of the net estate of every decedent * * *.

* * * * *

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(a) *Decedent's interest.*—To the extent of the interest therein of the decedent at the time of his death;

* * * * *

Original Creek Agreement, Act of March 1, 1901, c. 676, 31 Stat. 861:

* * * * *

3. All lands of said tribe, except as herein provided, shall be allotted among the citizens of the tribe by said commission so as to give each an equal share of the whole in value, as nearly as may be, in manner following: There shall be allotted to each citizen one hundred and sixty acres of land—boundaries to conform to the Government survey—which may be selected by him so as to include improvements which belong to him. One hundred and sixty acres of land, valued at six dollars and fifty

cents per acre, shall constitute the standard value of an allotment, and shall be the measure for the equalization of values, and any allottee receiving lands of less than such standard value may, at any time, select other lands, which, at their appraised value, are sufficient to make his allotment equal in value to the standard so fixed.

* * * * *

7. Lands allotted to citizens hereunder shall not in any manner whatsoever, or at any time, be incumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor and such lands shall not be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior.

Each citizen shall select from his allotment forty acres of land as a homestead, which shall be nontaxable and inalienable and free from any incumbrance whatever for twenty-one years, for which he shall have a separate deed, conditioned as above: *Provided,* That selections of homesteads for minors, prisoners, convicts, incompetents, and aged and infirm persons, who cannot select for themselves, may be made in the manner herein provided for the selection of their allotments; and if, for any reason, such selection be not made for any citizen, it shall be the duty of said commission to make selection for him.

The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after the ratification of this agreement, but if he have no such issue, then he may dis-

pose of his homestead by will, free from limitation herein imposed, and if this be not done, the land shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, free from such limitation.

Supplemental Creek Agreement, Act of June 30, 1902, c. 1323, 32 Stat. 500:

* * * * *

MISCELLANEOUS

* * * * *

16. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear.

* * * * *

Act of April 26, 1906, c. 1876, 34 Stat. 137:

* * * * *

SEC. 19. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act,

unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: *Provided, however,* That such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: *Provided further,* That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void: *Provided further,* That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee.

* * * * *

Act of May 27, 1908, c. 199, 35 Stat. 312:

> * * * All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. * * *
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> SEC. 4. That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes: *Provided,* That allotted lands shall not be subjected or held liable, to any form of personal claim, or demand, against the allottees arising or existing prior to the removal of restrictions, other than contracts heretofore expressly permitted by law.
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> * * * * *
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> SEC. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided,* That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdic-

tion of the settlement of the estate of said deceased allottee: *Provided further,* That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: *Provided further,* That the provisions of section twenty-three of the act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section.

* * * * *

Act of May 10, 1928, c. 517, 45 Stat. 495:

* * * * *

SEC. 3. That all minerals, including oil and gas, produced on or after April 26, 1931, from restricted allotted lands of members of the Five Civilized Tribes in Oklahoma, or from inherited restricted lands of full-blood Indian heirs or devisees of such lands, shall be subject to all State and Federal taxes of every kind and character the same as those produced from lands owned

by other citizens of the State of Oklahoma; * * *.

SEC. 4. That on and after April 26, 1931, the allotted, inherited, and devised restricted lands of each Indian of the Five Civilized Tribes in excess of one hundred and sixty acres shall be subject to taxation by the State of Oklahoma under and in accordance with the laws of that State, and in all respects as unrestricted and other lands: *Provided,* That the Indian owner of restricted land, if an adult and not legally incompetent, shall select from his restricted land a tract or tracts, not exceeding in the aggregate one hundred and sixty acres, to remain exempt from taxation and shall file with the superintendent for the Five Civilized Tribes a certificate designating and describing the tract or tracts so selected: *And provided further,* That in cases where such Indian fails, within two years from date hereof, to file such certificate, and in cases where the Indian owner is a minor or otherwise legally incompetent, the selection shall be made and certificate prepared by the superintendent for the Five Civilized Tribes; * * * and said lands, designated and described in the approved certificates so recorded, shall remain exempt from taxation while the title remains in the Indian designated in such approved and recorded certificate, or in any full-blood Indian heir or devisee of the land: *Provided,* That the tax exemption shall not extend beyond the period of restrictions provided for in this Act: *And provided further,* That the tax-exempt land of any such Indian allottee, heir, or devisee shall not at any time exceed one hundred and sixty acres.

U. S. GOVERNMENT PRINTING OFFICE: 1947

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 327

A. M. LANDMAN, Superintendent of the Five Civilized Tribes, for Estate of Punskee Field, Deceased Creek, Roll No. 4564,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

Huston Thompson,
Oscar P. Mast,
Counsel for Petitioner.

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Citations

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 327

A. M. LANDMAN, SUPERINTENDENT OF THE FIVE CIVILIZED TRIBES, FOR ESTATE OF PUNSKEE FIELD, DECEASED CREEK, ROLL NO. 4564, *Petitioner,*

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

To the Honorable the Supreme Court of the United States:

The petitioner, A. M. Landman, Superintendent of the Five Civilized Tribes, acting on behalf of the Secretary of the Interior, for the Estate of Punskee Field, deceased, Creek Indian, Roll No. 4564, prays that a writ of certiorari issue to review the judgment of the Court of Claims of the United States entered in the above entitled cause.

Opinion Below

The opinion of the Court of Claims is reported in 71 F. Supp. 640 (R. 11).

Jurisdiction

The judgment of the Court of Claims was entered June 6, 1947 (R. 18). The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

Question Presented

Whether the statutory and contractual exemption from taxation of the allotted land of a restricted full-blood Creek Indian who died intestate on June 5, 1940, leaving surviving him his wife and two daughters, all full-blood restricted Creek Indians, operates to exclude for Federal estate tax purposes, the oil and gas royalties accruing therefrom prior to April 26, 1931, from the estate of the Indian.

Treaties, Statutes, and Regulations Involved

The treaties, statutes, and regulations involved will be found in the Appendix, *infra*.

Statement

Punskee Field, a restricted, full-blood Creek Indian, died intestate on June 5, 1940, leaving surviving him, his wife and two daughters, all full-blood, restricted Creek Indians, who inherited the decedent's estate in equal shares (R. 9).

Field had become possessed by allotment deeds of 160 acres of land in Section 24, Township 11 North, Range 11 East, Okfuskee County, Oklahoma, on the 28th day of August, 1903 (R. 7). There were two deeds, one for a homestead of forty acres and the other for 120 acres, both approved October 9, 1903.

The land was allotted to Field under the provisions of the Original Creek Agreement between the United States and the Creek Tribe, dated March 8, 1900, ratified by the Act

of Congress of March 1, 1901 (31 Stat. 861) and by the Creek Nation on May 25, 1901, as amended by the Supplemental Creek Agreement ratified by Act of Congress of June 30, 1902 (32 Stat. 500) and approved by the President of the United States on August 8, 1902 (*Tiger* v. *Western Investment Company,* 221 U. S. 286). Paragraph 16 of the Supplemental Creek Agreement declared that the homestead should be non-taxable for twenty-one years from the date of the deed.

Congress passed the Act of April 26, 1906 (34 Stat. 137) to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian territory. Section 19 of this Act, contained the following proviso: "Provided further, That all lands upon which restrictions are removed shall be subject to taxation, *and the other lands shall be exempt from taxation as long as the title remains in the original allottee.*" (Emphasis ours.)

Subsequently, and *prior to the creation of the State of Oklahoma on November 16, 1907,* the said section 19 of the Act of April 26, 1906, together with Sections 22 and 23 were lifted from the Act and made to constitute an agreement between the Creek Tribe and the Government of the United States and the same was ratified by the President of the United States on September 17, 1907, prior to the creation of the said State of Oklahoma. Section 19 placed restrictions on all lands allotted to full-blood Creek Indians *until April 26, 1931,* unless sooner removed by the acts of Congress and all lands from which the restrictions were not removed were to "be exempt from taxation as long as the title remains in the original allottee." (*Tiger* v. *Western Investment Company, supra.*)

By the Act of May 27, 1908 (35 Stat. 312), Congress extended the restrictions on property of Creek Indians to include those of one-half or more Indian blood in the case

of the homestead and those of three-quarters or more Indian blood in the case of the other allotted lands, the restrictions to remain thereon until April 26, 1931 unless sooner removed by the Secretary of the Interior.

On May 10, 1928 (45 Stat. 495), Congress amended the earlier Indian Acts and continued all restrictions on Creek Indian property until April 26, 1956. Section 3 thereof provided that all minerals, including oil and gas, produced *on and after April 26, 1931,* from restricted allotments should be subject *to all State and Federal taxes of every kind and character,* the same as those produced from lands owned by other citizens of the State of Oklahoma.

Under Section 4 of that same Act, Congress declared that *on and after April 26, 1931,* the restricted lands of each Indian *in excess of 160 acres* should be subject to taxation by the State of Oklahoma under and in accordance with the laws of that State, and in all respects as unrestricted and other lands, *but* provided that the Indian could make a selection not to exceed 160 acres which would "*remain exempt from taxation while the title remains in the Indian designated*" or in any full-blood Indian heir or devisee of the land. (Emphasis ours.)

On June 3, 1929, in response to the said Act of May 10, 1928, the United States selected for Field the identical lands which had been allotted to him in 1903 (R. 8), and certified that the lands selected were to be "tax exempt as long as the title thereto remains in the said Punskee Field or in any full-blood Indian heir or devisee of said lands; such tax exemption, in no event, however, to extend beyond April 2, 1956." The lands have been tax exempt and the restrictions have not been removed.

An oil and gas mining lease covering all of said 160 acres of allotted land was entered into by the decedent on January 24, 1919, negotiated by the Secretary of the Interior and approved by him on March 25, 1919. Production under

this lease was first had in 1922. The lease is still producing, but in greatly reduced quantities, and the royalties therefrom, under the provisions of the lease, have, at all times, been paid to the Superintendent of the Five Civilized Tribes (R. 9).

By the Act of January 27, 1933 (47 Stat. 777), Congress amended the requirement for continuation of exemption from taxes on the designated lands so that fully restricted Indians, although not full-bloods, might inherit said lands and retain the tax exemption. Congress also by this Act provided that all funds and other securities "now held by or which may hereafter come under the supervision of the Secretary of the Interior" are restricted and shall remain subject to the jurisdiction of the Secretary of the Interior until April 26, 1956.

The oil and gas royalties, in question here, were derived from decedent's tax-exempt land prior to April 26, 1931, and at the time of his death were held by the Secretary of the Interior in the form of cash, United States Treasury bonds, and a house and lot.

Petitioner filed claim for refund on behalf of decedent's estate on November 15, 1944. The Commissioner of Internal Revenue allowed petitioner a partial refund of $172.15 on April 21, 1945, but denied the claim for the balance of estate taxes paid on behalf of the decedent's estate, that is, $6,847.18, and petitioner brought this action to recover said amount of $6,847.18.

The Court of Claims found for petitioner with respect to item No. 1 of his claim, to wit, that the transfer of the allotment of the deceased Indian to his heirs, together with the minerals in place, was not subject to the Federal estate tax. With respect to item No. 2 of the claim, it found against the petitioner in his claim that the royalties derived prior to April 26, 1931, from the allotment, under the oil and gas lease, were not subject to the Federal estate tax.

Specification of Errors to Be Urged

The Court of Claims erred:

(1) In holding that the direct income derived from decedent's tax-exempt allotted land prior to April 26, 1931, in the form of oil and gas royalties, was includible in decedent's estate for Federal estate tax purposes.

(2) In not holding that the direct income derived from decedent's tax-exempt allotted land prior to April 26, 1931, in the form of oil and gas royalties, was not includible in decedent's estate for Federal estate tax purposes.

(3) In applying the same principles of taxation to the estate of this full-blood restricted Indian as are applied to the estates of citizens under no restrictions.

Reasons for Granting the Writ

This is a class case which should determine the liability for Federal estate taxes on the oil and gas royalties produced prior to April 26, 1931, in approximately 48 estates of restricted Indians, on which an estate tax has already been collected. As the years pass, other estates of restricted Indians will be subjected to like estate taxes and the same question raised, unless now settled.

The question concerns the construction of Statutes and Contractual Agreements between the Creek Tribe of Indians and the United States, which contained a tax exemption of the restricted lands.

The question presents a long standing dispute between the Treasury Department, represented by the Commissioner of Internal Revenue, who seeks to impose the tax, and the Department of the Interior through its Secretary and the Superintendent of the Five Civilized Tribes, as Trustee of the Indians, who seek to give full faith and credit to the

terms of the said Statutes and Agreements between the Indian Tribes and the Government.

It seeks to prevent the absorption and destruction of an instrumentality chosen by the Government for the Indians, in consideration for the delivery to the Government of vast lands of great value by the Indians, which instrumentality was selected and carved out of the Indians' lands by the Government and delivered to the Indians individually for their financial and economic protection.

It seeks to protect the instrumentality, which has been dwindling in income and is being destroyed by taxation, to such an extent that most of the Indians involved, who are illiterate and cannot compete with the white man, will become charges upon the Government.

It is of great importance to determine administrative procedure respecting the Indians, by the Secretary of the Interior, where Indian estates are being constantly subdivided and tax claims aimed at them by the Bureau of Internal Revenue. It is further important in that it is necessary to determine, once and for all, the tax limitations on the Bureau of Internal Revenue with respect to the interest of approximately 6,500 Indians who now have interests in estates accruing from oil and gas royalties derived from restricted allotments.

It involves an important question of Federal law affecting the administration of Indian affairs and the revenue laws, which has not been, but should be, settled by this Court.

Conclusion

WHEREFORE, petitioner respectfully prays that the writ of certiorari may issue.

HUSTON THOMPSON,
OSCAR P. MAST,
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 327

A. M. LANDMAN, SUPERINTENDENT OF THE FIVE CIVILIZED TRIBES, FOR ESTATE OF PUNSKEE FIELD, DECEASED CREEK, ROLL NO. 4564, *Petitioner,*

vs.

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION

Argument

Preliminary Statement

Petitioner in the Court of Claims sued on two grounds. On the first, the Court granted judgment in favor of petitioner, holding that the value of the allotment transferred, together with the minerals in place, was not subject to the Federal estate tax. On the second, the Court ruled against plaintiff's claim that the oil and gas royalties accruing prior to April 26, 1931 and comprised of cash, bonds and real estate which were purchased with moneys from said royalties, were not subject to the Federal estate tax.

On the first claim, Mr. Justice Littleton pointed out that in *Landman* v. *United States,* 103 Ct. Cls. 199, the Court had

already held that the allotment, including the value of the *oil and gas in place*, of Jacob Pierce, a deceased full-blood Creek Indian, was not properly includible in the decedent's gross estate. In reaching this conclusion the Court had interpreted *Oklahoma Tax Commission* v. *United States*, 319 U. S. 598, to mean that the exemption afforded by the Act of May 10, 1928 and also the Act of April 26, 1906, was intended not only to cover direct taxes on the land, but also excise taxes on the transfer of the land by death. He pointed out that the tax under consideration was a Federal tax, and in the *Oklahoma* case it was a State tax, but that this was immaterial as the taxes are identical in character, both being levied upon the transfer of property by death and that the Supreme Court undoubtedly rested its construction in the *Oklahoma Tax Commission* case on the Acts of April 26, 1906 and May 10, 1928. Mr. Justice Littleton further pointed out that the Court of Claims considered the decision in the *Oklahoma Tax Commission* case on this point to be in conflict with and overruling the decision on the same point in a like case by the Circuit Court of Appeals in *Landman* (for Jeanetta Burgess) v. *Commissioner*, 123 F. (2d) 787. (Certiorari denied 315 U. S. 810.)

Mr. Justice Littleton, in denying the second claim of plaintiff, that the direct income from the allotted lands in the form of cash, Government bonds, and a house and lot purchased from these restricted funds, was not subject to Federal estate taxation, gave no reason for this ruling, except to say that the majority opinion in the *Oklahoma Tax Commission* case had held that the treaties, agreements and statutes had been considered by the Supreme Court and that the funds and securities involved were not exempt from the Oklahoma estate tax.

Direct Income v. Income Derived from Reinvested Income

The direct income from oil and gas royalties, here involved, accrued *prior to April 26, 1931,* and at the time of decedent's death was held for him by the Secretary of the Interior in the form of cash, Government bonds, and a house and lot.

We are here *not* claiming exemption from taxation of any interest derived from the cash, or dividends on the bonds, or income from the real estate. Petitioner is only claiming exemption of the royalties up to April 26, 1931, including the property into which the royalties were converted.

In other words, petitioner admits that any interest on the cash, or dividends on the bonds, or income from the house, should be subject to the estate tax as distinguished from the royalties received direct from the allotment, which should not be taxed.

Wholly aside from any question of law that might be enforced against an unrestricted Indian, there is a set of circumstances here that cannot, and should not, be evaded by this Government.

It was not the Indian who sought to lease his allotment for gas and oil. He had nothing to say about it. It was the Secretary of the Interior *who negotiated the lease.* What can we say in defense of a Government, which, up to 1941, admitted and declared that it could not tax the oil and gas in place, but could, and did, require the Indian to lease his property, remove the gas and oil and then tax it when removed. This Court has said that laws are to be liberally construed in connection with the Indian, and resolved in his favor where doubtful. They are to be construed not according to technical meaning but in the sense in which they would naturally be understood by the Indians. See *Jones* v. *Meehan,* 175 U. S. 1, *Choate* v. *Trapp,* 224 U. S. 665, *Carpenter* v. *Shaw,* 280 U. S. 363.

In the light of the above circumstances, can it be said in good conscience that the Indian, being forced to do what he did do, by his guardian, should now be subject to an estate tax when he has removed the oil and gas, at the Government's demand, but not subject to estate tax if it had been kept intact in the allotment?

All Departments of the Government for Many Years Interpreted the Indian Statutes and Agreements to Mean That the Oil and Gas Royalties Derived from Tax-Exempt Allotted Lands Prior to April 26, 1931, Were Not Subject to the Federal Estate Taxes.

This Court has frequently stated that the interpretation of the law by the departments would be given serious consideration. This being so, in the light of the rulings of the Secretary of the Interior, the Bureau of Internal Revenue, the Treasury Department, in fact all Government divisions or sub-divisions concerned, did the 10th Circuit in its opinion in *Landman* (for Jeanetta Burgess) v. *Commissioner of Internal Revenue, supra,* or this Honorable Court in the *Oklahoma Tax Commission* case, *supra,* give consideration to the interpretation of the Government departments and make the proper distinction between the taxing of the *income from reinvested income,* as distinguished from the exemption from taxation of the *direct income?*

In Section 3 of the Act of May 10, 1928 (45 Stat. 495) Congress declared "That all minerals, including oil and gas, produced *on or after April 26, 1931,* from restricted allotted lands of members of the Five Civilized Tribes in Oklahoma, * * * shall be subject to all State and Federal taxes of every kind and character." (Emphasis ours.)

Previous to this declaration, the Treasury Department had recognized that oil and gas royalties produced from the allotments were exempt from Federal estate taxation. In

Section 4 of the same Act it was provided that the Indian should select 160 acres to remain *exempt from taxation until 1956,* and the allotment in question was so selected. How is it possible, then, to interpret these sections together, giving due effect to the words "produced on or after April 26, 1931" and yet subject the oil and gas royalties produced prior to April 26, 1931, to estate taxation?

After the passage of the Act of 1928, and for many years, all of the departments or divisions of the Government concerned, continued to interpret the Statutes and Agreements as meaning that the oil and gas royalties produced from the allotments prior to April 26, 1931, were not subject to Federal estate taxes. However, the carelessly read decision of Mr. Justice McReynolds in *Superintendent* (for Sandy Fox) v. *Commissioner,* 295 U. S. 418 (1935), by the then Board of Tax Appeals (now The Tax Court) has resulted in a reversal of some of these interpretations.

The *Sandy Fox* case does not sanction or mention the imposition of an estate or any other kind of a tax on the direct income or royalties from an Indian allotment. The question involved there was the right of the Government to impose an income tax on the *income derived from the reinvestment of income* from restricted allotted lands. The sole question under consideration was whether an income tax should be imposed on income derived from reinvested income.

Mr. Justice McReynolds, speaking of the statutory *exemption* from taxation of the land, said that *it* did not apply *"to income derived from the investment of surplus income from land."* In order to sustain his point and make clear what he meant by surplus income from land he referred to the case of *Shaw* v. *Gibson-Zahniser Oil Corporation,* 276 U. S. 575. In the *Shaw* case, *supra,* the Department bought for the Indian, out of his oil and gas money, land that had

been owned by citizens of the state of Oklahoma and subject to taxation by the State. The Secretary then leased this land for the Indian to a private corporation which drilled for oil and gas and paid the Indians royalties therefrom. It was these royalties from purchased land that Mr. Justice Stone said were subject to taxation. In his opinion he stated that these purchased lands were "far less intimately connected with the performance of an essential governmental function (the instrumentality for the protection of the Indian) than were the restricted allotted lands, and the accomplishment of their purpose obviously does not require entire independence of state control in matters of taxation." (Insert ours.)

After the decision in the *Sandy Fox* case, *supra*, the Treasury Department and the Bureau of Internal Revenue were called upon to give a ruling as to the future procedure of the levying of estate taxes on oil and gas royalties from these allotments. The general counsel of the Treasury Department, Mr. Oliphant, on December 28, 1935 (GC:I:EWM-A-281892) in the Estate of Jacob Pierce, deceased, a full-blood Creek Indian, said that "Up to *April 26, 1931*, all restricted allotted lands * * * *and the income therefrom*, shall be treated as *exempt* from Federal taxation * * *." (Emphasis ours.)

In June, 1936, Mr. Jackson, then the assistant general counsel for the Bureau of Internal Revenue and now an Associate Justice of this Court, issued a memorandum interpreting the *Sandy Fox* case, for the Bureau (G.C.M. 16020, C.B. June 1936, p. 78). In his opinion he said that he was being requested on account of the *Sandy Fox* case to outline any changes in procedure with reference to the taxability of income of restricted Indians of the Five Civilized Tribes and he added, "That case involved the taxability

of the income of a restricted Indian derived from the *reinvestment of income from restricted allotted lands, the original income* having been considered to be *tax-exempt as from a tax-free source.*" (Emphasis ours.) He then referred to an opinion of the Attorney General of March 15, 1924, holding that "all of the restricted allotted lands continued to be exempt from taxation during the continuance of the restrictions 'in accordance with the purpose and intent of Section 19 of the Act of April 26, 1906.'" He added, "This office is of the opinion, therefore, that no change in the procedure followed by the Bureau for the period up to April 26, 1931, in respect of the taxability of the restricted allotted lands of the members of the Five Civilized Tribes, *and of the income derived directly therefrom*, is required on account of the decision of the Supreme Court in *Superintendent etc.* v. *Commissioner, supra.*"

The respondent in its brief in the Court below stated, as follows:

> "Pursuant to an Opinion of the Attorney General of the United States on March 15, 1924 (34 Op. A. G. 275 (1923-1925)), and a number of memoranda by the Chief Counsel for the Bureau of Internal Revenue, the value of designated, allotted lands of the Creek Indians, *and the direct income therefrom*, was, for many years, treated by the Bureau of Internal Revenue as excludable from estates of restricted Creek Indians." (Emphasis ours.)

Despite these rulings, subordinates in the Bureau kept agitating the claim for estate taxes on the royalties, until they forced the Secretary of the Interior to apply to the Board of Tax Appeals for a ruling on both the allotments and the royalties (Landman, Superintendent, for the Estate of Jeanetta Burgess, nee Tiger, 42 B. T. A. 958). The

Board misinterpreted the facts in the *Sandy Fox* case, as is clear from its opinion, in the following statement:

> "The petitioner contends that the above cited case is not in point in this proceeding for the reason that the Court was there dealing only with income derived from the investment of surplus funds of a restricted Indian and not with income derived from royalties on oil produced from the Indian's land. It is apparent, however, from the rationale of the opinion and from the cases cited, *that the court intended to make no distinction between a restricted Indian's income derived from the investment of surplus funds and his other taxable income.*" (Emphasis ours.)

This ruling reversed all previous interpretations of the opinion of Mr. Justice McReynolds and was contrary to the facts in the *Sandy Fox* case.

In the case of *Landman, Superintendent, for the Estate of Jeanetta Burgess, nee Tiger, supra,* the Circuit Court of Appeals for the 10th Circuit, reviewing the opinion of the Board of Tax Appeals, fell into the same error in considering the *Sandy Fox* case, when it said, referring to the *Sandy Fox* case,

> "The court found nothing in the treaties, agreements, and acts of Congress, upon which the Superintendent now relies, which would justify exclusion from taxation the income derived from the restricted land * * *. The court made a clear distinction between a tax levied upon land as such, and the income derived therefrom."

The Board and the Court not only failed to interpret the Statutes and Agreements between the Government and the Indians, in a manner in which the Indian under the circumstances had the right to understand the exemption from taxation of his royalties, but also obviously failed to give consideration to the kind of income that Mr. Justice McRey-

nolds was considering. Nor did they apparently give any weight to the interpretations of Messrs. Oliphant and Jackson, the Attorney General, and the practice of the Department of the Interior during all of the period in which estate taxes have been levied by the U. S. Government.

The Oil and Gas Royalties Are Exempt from Estate Taxation by the Agreements of 1901-1902; the Act of April 26, 1906 and the Agreement Between the Indians and the Government Approved by the President September 17, 1907; and Sections 3 and 4 of the Act of May 10, 1928.

The exemption of the Indian's land from taxation was intended by Congress to preserve such land for the benefit and enjoyment of the Indian allottee and his heirs. This purpose of Congress would be defeated if the income from the land is subjected to taxation. In *Pollock* v. *Farmers Loan and Trust Company*, 155 U. S. 429, it was said that a tax upon the income received from land is the same, in substance, as a tax on the land, because land, independently of its produce, is of no value. This Court in *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308, stated that its holding in *Pollock* v. *Farmers Loan and Trust Company, supra*, that the tax was "direct" was not based on the ground that the tax on the income was a tax on the land, but that for purposes of apportionment, there were similarities in the operation of the two kinds of tax which made it appropriate to classify both as direct and within the Constitutional command.

In the instant case, petitioner does not contend that a tax on the income is necessarily a tax on the land from which it is derived, but does contend that for purposes of according the Indian full benefit of the exemption of the land from taxation, as provided by Congress, a tax on the direct in-

come, such as oil and gas royalties, is the same, in effect, as a tax on the land.

If, as the Court of Claims has held, the allotment was exempt from estate taxation, then the oil and gas moneys derived directly from the lease on the allotment must also be exempt from such taxation. Incidentally, none of the cases cited by respondent in the Court of Claims are applicable here, for they refer to the taxability of property of unrestricted citizens, whereas the decedent and his heirs are fully restricted Indians.

Petitioner points out that not only was the allotted land, including the oil and gas in place and the oil and gas royalties derived therefrom, exempt from direct taxation, but they were also exempt from indirect taxation on their transfer to decedent's heirs, by the Act of 1901 and 1902, by Section 19 of the Act of April 26, 1906, by the Contractual Agreement between the Indians and the Government dated September 17, 1907, and by Sections 3 and 4 of the Act of 1928.

Why did Congress and the Executive Department of our government place an exemption from taxation in Section 19 of the Act of April 26, 1906, and in the Agreement between the Indians and the Federal Government of 1907? The answer brings us back to the creation of the State of Oklahoma.

Congress, according to this Court, had power to lay taxes upon Indian property within Indian Territory (*The Cherokee Tobacco*, 11 Wall. 616) and its creature, the Territorial Government, was agitating for the taxation of Indian property (See S. Doc. 169, 58th Cong., 2nd Session).

In order to stop the Territorial Government and its agitation for taxation of the Indian property, Congress and the Executive Department of the Government decided that it was necessary to write specific tax exemptions into the

Allotment Acts of 1901 and 1902 and in Section 19 of the Act of April 26, 1906. These exemptions were aimed at the Federal Government and its creature, the Territorial Government. They could not have been otherwise, because there was no State Government then in existence.

The State, having been created in November, 1907, and by its Organic Act having agreed not to tax the Indians' property, it is perfectly obvious that the State could not have been the one aimed at in the tax exemption clauses of the Acts and Agreements of 1901, 1902 and 1906.

We come next to Section 4 of the Act of May 10, 1928. It states that 160 acres was to be designated by, or for, the Indian allottee as *tax exempt* and was "*to remain*" exempt from taxation while the title remained in the Indian designated, or in any full-blood Indian heir or devisee of the land. Why did the Congress insert the words "*remain exempt from taxation*" if it were not that Congress, looking back, understood that its previous legislation of 1906 and the Agreement of 1907 had cast an exemption over the allotments with respect to the Federal Government.

The above theory is supported by reference to Section 3 of the Act of May 10, 1928, subjecting oil and gas produced *on or after April 26, 1931*, to State and Federal taxes of every kind and character.

Again, why look forward into the future and fix an exact date twenty-five years from the Act of April 26, 1906, to wit, April 26, 1931, and declare, as Congress did, by necessary implication, that the taxation should not begin to run on the oil and gas produced until after April 26, 1931? We submit that the answer is conclusive that Congress meant to exempt, and not tax, the allotments and the oil and gas moneys produced from them until after April 26, 1931.

Why was the word "Federal" inserted in Section 3 of the Act of 1928? Respondent has said it was in order to fore-

stall the possibility of judicial misinterpretation of the Act as barring federal taxation of the oil and gas royalty income of exempted Indian lands. The correct answer is, of course, that it was inserted in Section 3 of the Act of 1928 because the Indian had acquired a vested right to tax exemption under Section 19 of the Act of 1906, and the Agreement of 1907, which were considered by Congress, by the Attorney General, by the Internal Revenue Bureau, and by the Department of the Interior, to exempt the direct income from the allotted lands.

Respectfully submitted,

HUSTON THOMPSON,
OSCAR P. MAST,
Attorneys for Petitioner.

APPENDIX

Excerpts from Treaties, Statutes and Regulations.

Treaties

Indian—Creek Tribe:

Treaty of January 24, 1826 (7 Stat. 286).

Preamble:

"* * * And whereas the United States are unwilling that difficulties should exist in the said Nation which may eventually lead to an intestine war, and are still more unwilling that any cessions of land should be made to them, unless with fair understanding and full assent of the Tribe making such session, *and for a just and adequate consideration, it being the policy of the United States, in all their intercourse with the Indians, to treat them justly and liberally, as becomes the relative situation of the parties.* * * *" (Emphasis ours)

Article 13:

"*The United States agree to guarantee to the Creeks all the country, not herein ceded,* to which they have a just claim, and to make good to them any losses they may incur in consequence of the illegal conduct of any citizen of the United States within the Creek country." (Emphasis ours)

Treaty of March 24, 1832 (7 Stat. 366).

Article 14:

"*The Creek country west of the Mississippi shall be solemnly guaranteed to the Creek Indians,* nor shall any State or Territory ever have a right to pass laws for the government of such Indians, but they shall be allowed to *govern themselves,* so far as may be compatible with the general jurisdiction which Congress may think proper to exercise over them. And the United States will also defend them from the unjust

hostilities of other Indians, and will also as soon as the boundaries of the Creek country west of the Mississippi are ascertained, cause a patent or grant to be executed to the Creek tribe; agreeably to the 3d section of the Act of Congress of May 2d, (28) 1830, entitled 'An Act to provide for an exchange of lands with the Indians residing in any of the States, or Territories, and for their removal West of the Mississippi.'" (Emphasis ours)

Treaty of February 14, 1833 (7 Stat. 417).

Article 3:

"The United States will grant a patent, in fee simple, to the Creek nation of Indians for the land assigned said nation by this treaty or convention, whenever the same shall have been ratified by the President and Senate of the United States—and the right thus guaranteed by the United States shall be continued to said tribe of Indians, so long as they shall exist as a nation, and continue to occupy the country hereby assigned them."

Treaty of June 14, 1866 (14 Stat. 785).

Article 3:

"In compliance with the desire of the United States to locate other Indians and freedmen thereon, the Creeks hereby cede and convey to the United States, to be sold to and used as homes for such other civilized Indians as the United States may choose to settle thereon, the west half of their entire domain, to be divided by a line running north and south; *the eastern half of said Creek lands, being retained by them shall, except as herein otherwise stipulated, be forever set apart as a home for said Creek Nation;* and in consideration of said cession of the west half of their lands, estimated to contain three million two hundred and fifty thousand five hundred and sixty acres, *the United States agree to pay the sum of thirty (30) cents per acre,* amounting to nine hundred and seventy-five thou-

sand one hundred and sixty-eight dollars, * * *." (Emphasis ours)

Article 12:

"*The United States reaffirms and reassumes all obligations of treaty stipulations with the Creek nation entered into before the treaty of said Creek nation with the so-called Confederate states,* July tenth, eighteen hundred and sixty-one, not inconsistent herewith; and further agrees to renew all payments of annuities accruing by force of said treaty stipulations from and after the close of the present fiscal year, June thirtieth, eighteen hundred and sixty-six, except as is provided in article eleventh." (Emphasis ours)

Statutes

Indian—Five Civilized Tribes:

Act of May 28, 1830 (4 Stat. 411, 412).

Section 3:

"*And be it further enacted,* That in the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made, *that the United States will forever secure and guaranty to them, and their heirs or successors, the country so exchanged with them;* and if they prefer it, *that the United States will cause a patent or grant to be made and executed to them for the same;* Provided always, That such lands shall revert to the United States, if the Indians become extinct, or abandon the same." (Emphasis ours)

Act of March 3, 1893 (27 Stat. 612, 645).

Section 15:

"The consent of the United States is hereby given to the allotment of lands in severalty not exceeding one hundred and sixty acres to any one individual within the limits of the country occupied by the Cherokees,

Creeks, Choctaws, Chickasaws, and Seminoles; and upon such allotments the individuals to whom the same may be allotted shall be deemed to be *in all respects citizens of the United States.* * * *"

Section 16:

"The President shall nominate and, by and with the advice and consent of the Senate, shall appoint three commissioners to enter into negotiations with the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation, the Muscogee (or Creek) Nation, the Seminole Nation, *for the purpose of the extinguishment of the national or tribal title to any lands* within that Territory now held by any and all of such nations or tribes, either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians * * *." (Emphasis ours)

Act of June 28, 1898 (30 Stat. 495, 497).

Section 11:

"* * * Provided further, That the lands allotted shall be non-transferable until after full title is acquired and shall be liable for no obligations contracted prior thereto by the allottee, *and shall be nontaxable while so held.* * * *" (Emphasis ours)

Indian—Creek Tribe:

Act of March 1, 1901 (31 Stat. 861).

Section 7:

"Lands allotted to citizens hereunder shall not in any manner whatsoever, or at any time, be incumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor and such lands *shall not be alienable by the allottee or his heirs at any time before the expiration of five years* from the ratification of this

agreement, except with the approval of the Secretary of the Interior.

"Each citizen shall select from his allotment forty acres of land as a homestead, which shall be nontaxable and inalienable and free from any incumbrance whatever for *twenty-one years*, for which he shall have a separate deed, conditioned as above: * * *

"The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after the ratification of this agreement, but if he have no such issue, then he may dispose of his homestead by will, free from limitation herein imposed, and if this be not done, the land shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, free from such limitation." (Emphasis ours)

* * * * * * *

Section 44:

"This agreement shall in no wise affect the provisions of existing treaties between the United States and said tribe except so far as inconsistent therewith."

Act of June 30, 1902 (32 Stat. 500).

Section 16:

"Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear. * * *"

Indian—Five Civilized Tribes:

Act of April 26, 1906 (34 Stat. 137).

Section 19:

"That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes *shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act*, unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: * * * *Provided further, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee.*" (Emphasis ours)

Act of May 27, 1908 (35 Stat. 312).

"* * * All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, *and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood*, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. * * *" (Emphasis ours)

* * * * * * *

Section 4:

"That all lands from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes: Provided, That allotted lands shall not be subjected or held liable, to any form of personal claim, or demand, against the allottees arising or existing prior to the removal of restrictions, other than contracts heretofore expressly permitted by law."

Act of May 10, 1928 (45 Stat. 495) *as amended by the Act of May 24, 1928* (45 Stat. 733).

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the restrictions against the alienation, lease, mortgage, or other encumbrance of the lands allotted to members of the Five Civilized Tribes in Oklahoma, enrolled as of one-half or more Indian blood, be, and they are hereby, extended for an additional period of twenty-five years commencing on April 26, 1931: * * *."

Section 3:

"*That all minerals, including oil and gas, produced on or after April 26, 1931,* from restricted allotted lands of members of the Five Civilized Tribes in Oklahoma, or from inherited restricted lands of full-blood Indian heirs or devisees of such lands, *shall be subject to all State and Federal taxes of every kind and character* the same as those produced from lands owned by other citizens of the State of Oklahoma; and the Secretary of the Interior is hereby authorized and directed to cause to be paid, from the individual Indian funds held under his supervision and control and belonging to the Indian owners of the lands, the tax or taxes so assessed against the royalty interest of the respective Indian owners in such oil, gas, and other mineral production." (Emphasis ours)

Section 4:

"*That on and after April 26, 1931, the allotted, inherited, and devised restricted lands of each Indian of the Five Civilized Tribes in excess of one hundred and sixty acres shall be subject to taxation by the State of Oklahoma* under and in accordance with the laws of that State, and in all respects as unrestricted and other lands: *Provided, That the Indian owner of restricted land,* if an adult and not legally incompetent, *shall select from his restricted land a tract or tracts, not exceeding in the aggregate one hundred and sixty acres, to remain exempt from taxation,* and shall file with the Superintendent of the Five Civilized Tribes, a certificate designating and describing the tract or tracts so selected: * * * *and said lands,* designated and described in the approved certificates so recorded, *shall remain exempt from taxation while the title remains in the Indian designated in such approved and recorded certificate,* or in any full-blood Indian heir or devisee of the land: Provided, That the tax exemption shall not extend beyond the period of restrictions provided for in this Act: And Provided further, That the tax exempt land of any such Indian allottees, heir, or devisee shall not at any time exceed one hundred and sixty acres." (Emphasis ours)

Act of January 27, 1933 (47 Stat. 777).

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all funds and other securities now held by or which may hereafter come under the supervision of the Secretary of the Interior, belonging to and only so long as belonging to Indians of the Five Civilized Tribes in Oklahoma of one-half or more Indian bloods, enrolled or unenrolled, are hereby declared to be restricted and shall remain subject to the jurisdiction of said Secretary until April 26, 1956, subject to expenditure in the meantime for the use and benefit of the individual Indians to whom such funds and securities belong, under such rules and regulations as said Secre-

tary may prescribe: Provided, That where the entire interest in any tract of restricted and tax-exempt land belonging to members of the Five Civilized Tribes is acquired by inheritance, devise, gift, or purchase, with restricted funds, by or for restricted Indians, such lands shall remain restricted and tax-exempt during the life of and as long as held by such restricted Indians, but not longer than April 26, 1956, unless the restrictions are removed in the meantime in the manner provided by law: Provided further, That such restricted and tax-exempt land held by anyone, acquired as herein provided, shall not exceed one hundred and sixty acres: And provided further, That all minerals including oil and gas, produced from said land so acquired shall be subject to all State and Federal taxes as provided in section 3 of the Act approved May 10, 1928 (45 Stat. 495)."

Revenue:

Revenue Act of 1926, c. 27, 44 Stat. 9:

Title III—Estate Tax.

* * * * * * *

SEC. 301. (a) In lieu of the tax imposed by Title III of the Revenue Act of 1924, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 303) is hereby imposed upon the transfer of the net estate of every decedent dying after the enactment of this act, whether a resident or nonresident of the United States;

* * * * * * *

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death;

* * * * * * *

Regulations.

Treasury Regulations 70, Promulgated Under the Revenue Act of 1926:

Gross Estate—General.

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ART. 10. *Character of interests included.*—It is designed by the foregoing provision of the statute that there shall be included in the gross estate the value of all property of the decedent whether real or personal, tangible or intangible, the beneficial ownership of which was in the decedent at the time of his death.

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 327

A. M. LANDMAN, SUPERINTENDENT OF THE FIVE CIVILIZED TRIBES, FOR ESTATE OF PUNSKEE FIELD, DECEASED CREEK, ROLL NO. 4564, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On June 6, 1947, the Court of Claims entered judgment in this suit brought by the Superintendent of the Five Civilized Tribes to recover estate taxes paid on behalf of the estate of Punskee Field, a full-blood restricted Creek Indian, who died intestate on June 5, 1940. (R. 11, 18.) The judgment permitted the recovery of so much of the tax as was based upon the inclusion in the decedent's estate of the value of 160 acres of restricted, allotted land, including the oil and gas royalty interest therein, which had been designated, pursuant to Section 4 of the Act of May

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10, 1928, c. 517, 45 Stat. 495, to remain exempt from taxation. The United States has filed a petition for a writ of certiorari (No. 325, present Term) to review that holding, asserting a conflict with *Landman (Estate of Burgess)* v. *Commissioner,* 123 F. 2d 787 (C. C. A. 10), certiorari denied, 315 U. S. 810.

The present petition for a writ of certiorari, filed by the Superintendent of the Five Civilized Tribes for the estate of Punskee Field, seeks a review of that portion of the decision of the Court of Claims which held that those assets owned by the decedent (bonds, real estate and cash) which had been acquired out of oil and gas royalties received prior to April 26, 1931, from the lease of decedent's 160 acres of restricted allotted land, were properly included in the decedent's gross estate for federal estate tax purposes. This issue was decided by the Court of Claims (R. 16–17) expressly upon the authority of this Court's decision in *Oklahoma Tax Comm'n* v. *United States,* 319 U. S. 598. In that case this Court considered the applicability to the property of restricted Indian members of the Five Civilized Tribes of death taxes levied by the State of Oklahoma. Each of the estates there involved contained restricted cash, securities, and surplus or purchased land acquired chiefly through conversion of oil and gas royalty income derived

from the designated, allotted lands of the decedent. Without regard to the dates of realization of the royalty income, or its conversion into cash, securities and surplus real estate, this Court concluded that nothing in any relevant statute prevented inclusion of the value of the items in a restricted Indian's gross estate for the purposes of Oklahoma's estate tax. Although, as our petition in No. 325 points out, we think that none of the exemption provisions relied upon in the *Oklahoma* case are applicable to federal death taxes, the holding of the Court in the *Oklahoma* case with respect to the taxability of the cash, securities, etc., would apply *a fortiori* here. It follows that no statutory or treaty provision prohibits the inclusion of similar items in the Indian's gross estate for federal estate tax purposes. Indeed, in the taxpayer's petition for certiorari, it is not contended that property which may be included in a restricted Indian's gross estate for state death tax purposes may not likewise be included in the Indian's gross estate for federal estate tax purposes, nor is it contended that the decision of this Court in the *Oklahoma Tax Comm'n* case did not require the conclusion reached by the Court of Claims. The taxpayer's petition, in effect, seeks a reexamination by this Court of matters concluded by the *Oklahoma Tax Comm'n* decision.

CONCLUSION

The decision of the court below on the question presented in the taxpayer's petition for certiorari is in accord with this Court's decision in *Oklahoma Tax Comm'n* v. *United States.* The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

THERON LAMAR CAUDLE,
Assistant Attorney General.

HELEN R. CARLOSS,
LEE A. JACKSON,
JOHN W. HUSSEY,
Special Assistants to the Attorney General.

OCTOBER, 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947